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*See 12/30/14*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

oOo

IN RE

BK-N- 14-50333-BTB

ANTHONY THOMAS and WENDI  
THOMAS,

CHAPTER 7

[Lead Case Jointly Administered]

Debtor(s).

\_\_\_\_\_  
WILLIAM McGRANE

Adv. No. 14-5068

Plaintiff

Hearing Date: \_\_\_\_\_

and Time: \_\_\_\_\_

Mtn No.

vs.

MOTION TO DISMISS

ANTHONY THOMAS

Defendant

\_\_\_\_\_  
COMES NOW Defendant, Anthony Thomas, by and through undersigned counsel and files the following Motion to Dismiss. This motion is made and based upon the pleadings on file herein and the Memorandum of Points and Authorities attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

The complaint alleges that the Defendant retained Plaintiffs former law firm, Treppel McGrane Greenfield LLP ("the Firm"). The firm is a California Limited Partnership. The Plaintiff alleges that he had no

1 involvement with the representation of the Defendant. His only  
2 involvement had to do with filing the Firm's Motion to Withdraw as  
3 counsel of record for the Defendant in the matter of *Kenmark Ventures,*  
4 *LLC v. Tony Thomas, et al.*, Santa Clara Superior Court Case No. 1-08-CV-  
5 130677.

6 On February 28, 2012, the Defendant sued the Plaintiff and the  
7 Firm in state court ("State Court Action"). The Defendant's state court  
8 complaint alleged causes of action for Breach of Contract, Breach of  
9 Fiduciary Duty and Fraud against the firm and the Plaintiff in an  
10 individual capacity.

11 The Plaintiff alleges that the Defendant commenced the State Court  
12 Action be brought against Plaintiff, individually, without probable cause.  
13 Thomas willfully and maliciously initiated the State Court Action against  
14 Plaintiff, individually, with the intent to cause Plaintiff harm.  
15 Specifically, no reasonable person in the Defendant's circumstances  
16 would have believed that there were reasonable grounds to bring the  
17 State Court Action against Plaintiff, individually. The complaint seeks to  
18 have this claim declared nondischargeable under 11 U.S.C. §523(a)(6).  
19 The State Court Action is currently in arbitration. There has been no  
20 final resolution of the State Court Action at this time.

### 21 **Argument**

22 The complaint must be dismissed as it fails to state a claim upon  
23 which relief can be granted.

24 First, the Complaint alleges that Plaintiff had nothing to do with  
25 representing the Defendant other than filing a motion to withdraw for  
26 the Firm. The Defendant sued the Plaintiff for taking a \$150,000.00  
27  
28

1     retainer and doing virtually nothing. A copy of the State Court Action's  
2     complaint is attached hereto as Exhibit "1"<sup>1</sup>.

3             Under California law, Plaintiff has not set forth a claim as the State  
4     Court Action is pending.

5             Malicious prosecution is a disfavored action. This is due to the  
6     principles that favor open access to the courts for the redress of  
7     grievances. *Daniels v. Robbins*, 182 Cal.App.4th 204 (Cal. App. 2010).  
8     Three elements must be pleaded and proved to establish the tort of  
9     malicious prosecution: (1) A lawsuit was commenced by or at the  
10    direction of the defendant which was pursued to a legal termination in  
11    the plaintiff's favor; (2) the prior lawsuit was brought without probable  
12    cause; and (3) the prior lawsuit was initiated with malice. *Id.* Here there  
13    has not been a termination in Plaintiff's favor.

14            Abuse of process has two elements. First, there must be an ulterior  
15    purpose. Second, there must be a willful act in the use of the process not  
16    proper in the regular conduct of the proceeding. *Oren Royal Oaks*  
17    *Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* 42 Cal.3d 1157  
18    (Calif. S.Ct. 1987). Here Defendant has done nothing other than filing and  
19    maintaining the suit. "*The relevant California authorities establish,*  
20    *however, that while a defendant's act of improperly instituting or*  
21    *maintaining an action may, in an appropriate case, give rise to a cause of*  
22    *action for malicious prosecution, the mere filing or maintenance of a*  
23    *lawsuit—even for an improper purpose—is not a proper basis for an*  
24    *abuse of process action.*" *Id.* at 1209.

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25  
26     <sup>1</sup> As a general rule, a district court may not consider materials not originally  
27     included in the pleadings in deciding a Rule 12 motion, it may take judicial notice  
28     of matters of public record and may consider them without converting a Rule 12  
   motion into one for summary judgment. *U.S. v. 14.02 Acres of Land More or Less in*  
   *Fresno County*, 547 F.3d 943, 955 (9th Cir.2008)

1           Property rights in bankruptcy are defined by state law. *Butner v.*  
2     *United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). Since the  
3     Plaintiff could never recover upon a malicious prosecution or abuse of  
4     process action in California, he cannot use this Court to give him rights  
5     he does not have under state law. For that reason, the complaint must be  
6     dismissed.

7  
8           Dated: This 30 day of December, 2014

9  
10  
11           By:  \_\_\_\_\_

12           Michael Lehnert, Esq.  
13           429 Marsh Ave.  
14           Reno, Nevada 89509  
15           Nevada Bar Number 003331  
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Exhibit 1

Exhibit 1

MICHAEL T. MORRISSEY, CSBN: 062195  
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Attorneys for Plaintiff ANTHONY G. THOMAS

FILED Santa Clara Co  
 02/28/12 2:23pm  
 David N. Yamazaki  
 Chief Executive Officer  
 B-1 shannon: 07H01400  
 R#201200020558  
 FF \$395.00  
 TL \$295.00  
 Case: 1-12-CV-21958

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

ANTHONY G. THOMAS,

Plaintiff,

vs.

TREPEL McGRANE GREENFIELD LLP;  
 ANTHONY TREPEL, an individual;  
 WILLIAM McGRANE, an individual; and  
 DOES 1 through 100, inclusive,

Defendants.

Case No. 12 CV 219586

COMPLAINT FOR DAMAGES: BREACH  
 OF CONTRACT; BREACH OF  
 FIDUCIARY DUTY; FRAUD

BY FAX

COMES NOW the Plaintiff, ANTHONY G. THOMAS, to allege as follows:

1. Plaintiff ANTHONY G. THOMAS (aka Tony Thomas) is, and at all times herein mentioned was, a resident of Santa Clara County, California.

2. Plaintiff is informed and believes and based thereon alleges that Defendant TREPEL McGRANE GREENFIELD LLP (hereinafter "TMG") is a business organization with its principle place of business in Santa Clara County, California.

1           3.     Plaintiff is informed and believes and based on such information and belief  
2 alleges that defendant WILLIAM McGRANE (hereinafter "McGRANE") is a resident of San  
3 Francisco County, California.  
4

5           4.     Plaintiff is informed and believes and based on such information and belief  
6 alleges that defendant ANTHONY TREPEL (hereinafter "TREPEL") is a resident of Santa Clara  
7 County, California.  
8

9           5.     Plaintiff is ignorant of the true names and capacities of the defendants sued herein  
10 as DOES 1 through 100 and therefore sues said defendants by such fictitious names. Plaintiff is  
11 informed and believes and based thereon alleges that each of the fictitiously named defendants is  
12 responsible for the actions and damages complained of herein and that they are respectively the  
13 agents, principles, servants, masters, partners, co-conspirators and or joint venturers of and with  
14 their co-defendants.  
15

16                               **FIRST CAUSE OF ACTION**  
17                               **(BREACH OF CONTRACT – Defendant TMG only)**

18           6.     Plaintiff re-alleges and incorporates by reference each of the preceding paragraphs  
19 of this complaint as though fully set forth herein.

20           7.     On or about August 26, 2010, the Plaintiff engaged the services of defendant  
21 TMG pursuant to a written agreement entitled Master Agreement for Year 2010 Legal Services,  
22 a true and correct copy of which is attached hereto designated Exhibit "A" and by this reference  
23 made a part hereof.  
24

25           8.     One of the terms of the written contract was unclear and not in conformance with  
26 the actual agreement entered into between the parties so the letter enclosing the contract was  
27 modified to provide that the fee of One Hundred Fifty Thousand Dollars (\$150,000.00)  
28 mentioned in the contract was agreed to be the entire fee that TMG would earn in the matter.

1           9.       Thereafter, TMG did virtually no work in pursuit of the Plaintiff's case and in  
2 February 2011 breached the contract by falsely billing against it, taking excessive monies out of  
3 its trust account and later by demanding more fees. The breach of this contract constituted a  
4 breach of the original contract, as well as the contract as modified.  
5

6           10.      As a result of the breach of the original contract and the contract as modified, the  
7 Plaintiff has been damaged in the amount of the payments made to Defendant TMG in the  
8 amount of One Hundred Fifty Thousand Dollars (\$150,000.00).  
9

10          11.      The contract provides that if any action is required to enforce the terms of the  
11 contract the prevailing party shall be entitled to their reasonable attorney fees.

12               WHEREFORE, Plaintiff prays for judgment against defendant as set forth below.

13                               **SECOND CAUSE OF ACTION**  
14                               **(BREACH OF FIDUCIARY DUTY -All Defendants)**

15          12.      Plaintiff re-alleges and incorporates by reference each of the preceding paragraphs  
16 of this complaint as though fully set forth herein.  
17

18          13.      At all times herein mentioned the individual defendants, TREPEL and  
19 McGRANE owed the Plaintiff a fiduciary duty which prevented them from dealing unfairly with  
20 the Plaintiff and required them to render true and accurate time records.

21          14.      The defendants breached this duty by falsely claiming fees for time not worked,  
22 inflating fees and ultimately abandoning the Plaintiff by moving to withdraw forcing the Plaintiff  
23 to hire a new lawyer thereby wasting all time legitimately spent on his file.  
24

25          15.      As a result of the breach of fiduciary duty the Plaintiff has been damaged in an  
26 amount as yet unascertained but in excess of One Hundred Fifty Thousand Dollars  
27 (\$150,000.00).  
28



**WHEREFORE, Plaintiff prays for judgment against defendant as set forth below.**

17. Plaintiff re-alleges and incorporates by reference each of the preceding paragraphs complaint as though fully set forth herein.

19. At the time of making the representation it was false and the true facts were that the Defendants had intended to charge the Plaintiff much more than One Hundred Fifty Thousand Dollars (\$150,000.00).

21. Had Plaintiff known the true facts he would not have contracted with Defendant TMC. As a result of the fraudulent misrepresentations the Plaintiff has been damaged generally and specifically in an amount as yet unascertained but in excess of One Hundred Fifty Thousand Dollars (\$150,000.00).


COMPLAINT FOR DAMAGES  
THOMAS v. MCGRANT TREPEL GREENFIELD

WHEREFORE Plaintiff prays judgment as follows:

1. For special damages according to proof and as alleged in the body of the complaint;
2. For general damages according to proof and as alleged in the body of the complaint;
3. For interest on said sums;
4. For reasonable attorney fees;
5. For costs of suit herein incurred; and
6. For such other and further relief as the court deems proper.

DATED: February 20, 2012

Respectfully submitted,

  
MICHAEL T. MORRISSEY  
Attorney for Plaintiff ANTHONY G. THOMAS